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No. 96-109

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

DOUGLAS RAY HICKMAN, *in propria persona*
Petitioner,

v.

COUNTY OF LOS ANGELES, SHERMAN BLOCK, PATRICK G. LEONARD, CLAUDE FARRIS, ED BARSTON, THE CITY OF LOS ANGELES, ROBERT M. TALCOTT, HERBERT F. BOEKMANN, REV. A. B. TOOLEY, SAMUEL L. WILLIAMS, STEPHEN D. YSLAS, FRANK E. PEIRSOL, THE CITY OF SAN FERNANDO, AND DOMINICK J. RIVETTI,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE LAWYER'S SECOND AMENDMENT SOCIETY, LAW ENFORCEMENT ALLIANCE OF AMERICA AND DOCTORS FOR INTEGRITY IN POLICY RESEARCH, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI OF DOUGLAS RAY HICKMAN

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE LAWYER'S SECOND AMENDMENT SOCIETY, LAW ENFORCEMENT ALLIANCE OF AMERICA, AND DOCTORS FOR INTEGRITY IN POLICY RESEARCH IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

This motion of The Lawyer's Second Amendment Society (LSAS), Law Enforcement Alliance of America (LEAA) and Doctors for Integrity in Policy Research (DIPR) for leave to file the annexed brief *amicus curiae* is respectfully submitted pursuant to Supreme Court

Rule No. 37. Consent to the filing of this brief has been granted by Petitioner, and by counsel for Respondent County of Los Angeles, and these have been lodged with the Clerk of this Court. Consent has been withheld by counsel for Respondents City of San Fernando and Dominick J. Rivetti.

The Lawyer's Second Amendment Society (LSAS) is a non-profit California corporation headquartered in Encino, CA. LSAS fosters open, rigorous discussion of the constitutional right to arms. Its purposes include sponsoring legal, historical and philosophical scholarship on the topic and stimulating greater public knowledge and understanding of such scholarship, and participating in litigation regarding the Second Amendment.

The LSAS's policies are set by its Board of Directors, which consists only of attorneys. LSAS's Board evaluate the merits of any contemplated legal action and authorizes such action only where the LSAS's position will help establish the American people's right to keep and bear arms for self defense. The LSAS's Board has authorized the filing of an amicus curiae brief in this matter. LEAA's and DIPR's Boards of Directors have also authorized filing of an *amicus* brief in this matter.

Amici seek here to augment the argument in the petition for writ of certiorari. *Amici* believes their public policy perspective and litigation experience in support of Second Amendment rights will provide an additional viewpoint with respect to the constitutional issues presented.

The present case involves a Ninth Circuit Court of Appeals decision in which the panel held the Second Amendment to the United States Constitution does not confer upon individual citizens standing to enforce a personal right to keep and bear arms.

The *amici* believe the opinion below is in direct conflict with the plain meaning of the Second Amendment. Indeed, *amici* suggest the Ninth Circuit panel's holding that the Second Amendment guarantees only a "state's right" to maintain a militia is incorrect by virtue of the fact the Second Amendment is an integral part of the Bill of Rights, which, above all else, set forth, and guarantee, individual's rights vis-a-vis the government.

If allowed to stand, the opinion below will constitute a serious setback for individual rights, perhaps one of the most egregious such setbacks this century, by eliminating an important and time-honored right with the stroke of a pen.

For the foregoing reasons, The LSAS, LEAA and DIPR request that this motion for leave to file the annexed brief *amicus curiae* be granted.

DATED: August 16, 1996

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AMICUS BRIEF IN SUPPORT OF PETITIONER DOUGLAS RAY HICKMAN

INTERESTS OF THE AMICI

1. Amicus THE LAWYER'S SECOND AMENDMENT SOCIETY

THE LAWYER'S SECOND AMENDMENT SOCIETY (LSAS) is a non-profit California corporation headquartered in Encino, CA. LSAS fosters open, rigorous discussion of the constitutional right to arms. Its purposes include sponsoring legal, historical and philosophical schol-

arship on the topic and stimulating greater public knowledge and understanding of such scholarship. LSAS's specific activities include writing articles and research pieces for publication in legal and other periodicals, providing speakers on the issue of the individual right to keep and bear arms, publication of its newsletter, entitled, "The Liberty Pole," and participating in litigation regarding the Second Amendment.

2. Amicus LAW ENFORCEMENT ALLIANCE OF AMERICA

The Law Enforcement Alliance of America (LEAA) is a non-profit, non-partisan advocacy organization made up to tens of thousands of law enforcement professionals, crime victims, and concerned citizens dedicated to making America safer. LEAA represents its members' interests by assisting law enforcement professionals, securing victims' rights over criminals' rights, seeking criminal justice reforms that target violent criminals, not law-abiding citizens, and explaining, from a law enforcement perspective, why firearms regulation is not effective in controlling crime.

3. Amicus DOCTORS FOR INTEGRITY IN POLICY RESEARCH

Doctors for Integrity in Policy Research, Inc. (DIPR), a non-profit corporation, is a national "think tank" of medical school professors, researchers, and practicing physicians who are committed to exposing biased and incompetent research, editorial censorship, and unsound public policy. DIPR conducts review research, publishes and publicizes its findings, and, to promote sound public policy, testifies before Congressional and other legislative committees and participates in litigation.

DISCUSSION

I. INTRODUCTION

It cannot be doubted that one of the most contentious and polarizing issues of our day is whether the Second Amendment to the United States Constitution confers upon individuals the personal right to keep and bear arms for self defense.

Gun control proponents vigorously assert the Second Amendment merely codifies a "state's right," and further, that if individuals do enjoy a right under that Amendment, society's need to protect its members justifies any infringement on that right.

On the other hand, self-defense and pro-firearms activists suggest with equal vigor that the Second Amendment clearly and expressly recognizes an individual and inalienable right to keep and bear arms for the purpose of defending one's self, one's family and one's home.

Surprisingly, despite the increasing cacophony of the debate, this Court has yet to consider whether the Second Amendment guarantees an individual right, or a "states' right". On the few occasions the courts of appeals have considered the issue, they have reached contradictory and inconsistent results.

All the while, millions of Americans are becoming increasingly discontent with their government because they believe it is ignoring, or worse, denying the existence of, a basic right set forth in simple and plain English within the Second Amendment.

Amici respectfully suggest it is incumbent upon this Court, as the final arbiter of the Constitution and Bill of Rights, to resolve — once and for all — this increasingly divisive issue. Indeed, until such time as this Court permits the Second Amendment to take its rightful, logical and

historic place among the other personal freedoms and rights set forth in the Bill of Rights, this issue will remain as a persistent and recurrent problem.

It is also significant that, if the Court rules in conformity with the vast majority of scholarly research and holds the Second Amendment guarantees an individual right, such a ruling will not, *ipso facto*, invalidate any firearms laws. Rather, like all rights set forth in the Bill of Rights, the Second Amendment's right to keep and bear arms is subject to reasonable limitation. Before any gun control law could be invalidated, it would first have to be shown to *unreasonably* infringe on the individual's right to keep and bear arms.

For the above reasons, *amici* request that this Court grant Petitioner Douglas Ray Hickman's petition and issue its Writ of Certiorari to the Ninth Circuit Court of Appeals.

II. THE CIRCUITS ARE SPLIT ON THE MEANING OF THE SECOND AMENDMENT

Of the 13 federal courts of appeals, 10 have spoken on the Second Amendment, one holding the right guaranteed is not an individual right (the 4th Circuit), four holding it is an individual right (the 1st, 5th, 10th, and 11th Circuits), four with cases going each way (the 3rd, 6th, 8th and 9th Circuits), and one not addressing the question (the 7th Circuit). The remaining three circuits (2nd, District of Columbia, and Federal) have been silent. All but two of three cases, however, preceded this Court's decision in *U.S.* v. *Verdugo Urquidez*, 110 S. Ct. 3039 (1990).

In *Cases* v. *United States*, 131 F.2d 916 (1st Cir. 1942), *cert. denied sub nom., Velazquez v. U. S.*, 319 U.S. 770 (1943), the First Circuit Court of Appeals expressly acknowledged the Second Amendment guarantees an individual right when it noted the law in question "undoubtedly curtails to some extent *the right of individuals* to keep and

bear arms . . . ."[1] Emphasis added. Further, the court in *Cases* concluded *U.S.* v. *Miller*, 307 U.S. 174 (1939), should not be read as holding the Second Amendment guaranteed the right to possess or use large weapons that could not be carried by an individual. This impliedly acknowledges an individual right to own firearms; the issue is what types of firearms are encompassed within that right.

In *U.S. v. Graves*, 554 F.2d 65 (3rd Cir. 1977), the defendant did not raise the Second Amendment as a challenge to the "statutory program which restricts the right to bear arms of convicted felons and other persons of dangerous propensities."[2] However, a personal right in the Second Amendment is found in a footnote wherein the court states "[a]rguably, any regulation of firearms may be violative of this constitutional provision."

U.S. v. Tot, 131 F.2d 261 (3rd Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943) is another case involving possession of a firearm by a convicted felon. Despite holding that the failure of the defendant to prove, as required by *Miller*, a militia use for the firearm was an adequate basis for ruling against the defendant, the court, in *dicta*, concluded the Second Amendment "was not adopted with individual rights in mind . . . ." This result was based on reliance on an extremely brief analysis of common law and colonial history.[3] In addition, apparently recognizing that it decided the case on unnecessarily broad grounds, the court noted that, at

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[1] Id. at 921

[2] Implicit in this language is the fact that the Second Amendment guarantees an individual right, albeit a right that may not be enjoyed by some narrowly defined class of untrustworthy persons.

[3] For example, the court referred to the colonists as "a defenseless citizenry . . . ." In fact, it was precisely because the citizens *did* have arms and were not defenseless that they desired the Second Amendment; they did not want to *become* defenseless.

common law, while there was a right to bear arms, that right was not absolute and could be restricted for certain classes of persons "who have previously . . . been shown to be aggressors against society."

U.S. v. Johnson, 497 F.2d 548 (4th Cir. 1974) is one of the three court of appeals cases which uses the term "collective right." The entire opinion, however, is one sentence, which states the Second Amendment "only confers a collective right of keeping and bearing arms which must bear a 'reasonable relationship to the preservation or efficiency of a well-regulated militia'."[4] As authority for this statement, the court cites *Miller* and *Cody v. U.S., infra.* Yet, as this Court in *Lewis v. United States*, 445 U.S. 95 (1980) made clear, *Miller* held it is the firearm itself, not the act of keeping and bearing the firearm, which must have a "reasonable relationship to the preservation or efficiency of a well-regulated militia." Moreover, the particular provision at issue in *Johnson* concerned the interstate transportation of a firearm by convicted felons, a class of persons which historically has suffered the loss of numerous rights (including exclusion from the militia) accorded other citizens.

U.S. v. Bowdach, 414 F. Supp. 1346 (D.S. Fla 1976), *aff'd*, 561 F.2d 1160 (5th Cir. 1977). The court held that "possession of the shotgun by a non-felon has no legal consequences. U.S. Const. Amend II." Again, this is at least an implied recognition of the fact the Second Amendment confers an individual right upon citizens.

U.S. v. Johnson, Jr., 441 F.2d 1134 (5th Cir. 1971). Once again, this decision merely quotes from *Miller* the statement concerning the requirement of an evidentiary showing of a militia nexus and a consequent rejection, without even the

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[4]As with all rights guaranteed in the Bill of Rights, the Second Amendment does not "confer" any rights; it merely protects rights from government interference.

briefest of analysis, of the defendant's challenging to the constitutionality of the National Firearms Act of 1934 (NFA). Apparently, the defendant failed to put on evidence, as required by *Miller*, that the firearm at issue had a militia use. Thus, *Miller* bound the appeals court to reject the defendant's challenge.

U.S. v. Warin, 530 F.2d 103 (6th Cir. 1976), *cert. denied*, 426 U.S. 948 (1976). Following, and relying upon, its earlier decision in *Stevens, infra*, the court simply concluded, without any reference to the history of the Second Amendment, that it "is clear the Second Amendment guarantees a collective rather than an individual right." The court in Warin also indicated that, in reaching its decision, it was relying upon the First Circuit's decision in *Cases, supra*. Yet in concluding not all arms were protected by the Second Amendment, *Cases* did not hold, as did *Warin*, that the Second Amendment afforded individuals no protections whatever.

The court in *Warin* also erred in concluding Warin's relationship to the militia was relevant to determining whether his possession of a machine gun was protected by the Second Amendment, since this Court in *Miller* focused on the firearm itself, not the individual involved. In fact, this Court in *Miller* quite expansively defined the constitutional militia as encompassing "all males physically capable of action in concert for the common defense."

Citing *Miller*, the court in *U.S. v. Day*, 476 F.2d 562 (6th Cir. 1973) concluded, in reviewing a challenge to the statute barring dishonorably discharged persons from possessing firearms, that "there is no *absolute* right of an individual to possess a firearm." Emphasis added. Since there are certain narrowly defined classes of untrustworthy persons, such as convicted felons and, as here, persons dishonorably discharged from the armed forces, who may be barred the possession of firearms, it is a truism to say that there is not

an *absolute* right to possess firearms. In so saying, the court implicitly recognized the individual right of peaceful and honest citizens to possess firearm.

In a one sentence holding in *Stevens v. United States*, 440 F.2d 144 (6th Cir. 1971), the court simply concluded the Second Amendment "applies only to the right of the State to maintain a militia and not to the individual's right to bear arms . . . ." The ruling was based on an apparent misreading of *Miller* (as also happened in the present *Hickman v. County of Los Angeles* matter), in that the court undertook *no* analysis of *Miller* or of the history of the ratification of the Second Amendment. This case, moreover, involved possession of firearms by convicted felons, a class of persons whose right traditionally have been more restricted than law-abiding citizens.

In rejecting a Second and Fourteenth Amendment challenge to a local handgun ban, the court in *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983) held the Second Amendment, either of itself or by incorporation through the Fourteenth Amendment, "does not apply to the states. . . ." The court, in *dicta*, went on, however, to "comment" on the "scope of the second amendment," incorrectly summarizing *Miller* as holding that the right extends "only to those arms which are necessary to maintain a well regulated militia." Thus, finding (without evidence on the record) that "individually owned handguns [are not] military weapons," the court concluded that "the right to keep and bear handguns is not guaranteed by the second amendment."

U.S. v. McCutcheon, 446 F.2d 133 (7th Cir. 1971) is another case involving the NFA in which the court merely followed *Miller* in holding that the NFA did not infringe the Second Amendment.

In *U.S. v. Hale*, 978 F.2d 1016 (8th Cir. 1992), a case which was argued *pro se*, the court concluded that *Miller* held it was "not sufficient to prove the weapon in question was susceptible to military use. Rather, the claimant of Second Amendment protection must prove that his or her possession of the weapon was reasonably related to a well-regulated militia..... Hale introduced no evidence and made no claim of even the most tenuous relationship between his possession of the weapons and the preservation of a well regulated militia." Notably, one of the three judges, while concurring in the result, "disagree[d]" with the court's interpretation of *Miller*, insofar as it was interpreted to "say that Congress has the power to prohibit an individual from possessing any type of firearm, even when kept for lawful purposes."

U.S. v. Nelson, 859 F.2d 1318 (8th Cir. 1988), which is not a firearms case, involves the federal switchblade knife act. Based on part of the holding in *U.S. v Cruikshank*, 92 U.S. 542, 553 (1876), that the right to keep and bear arms "is not a right granted by the Constitution," the Eighth Circuit concluded that the right is not fundamental.[5] Of course, the *complete* statement in *Cruikshank* — a case

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[5] *Cruikshank* was the first case in which this Court had the opportunity to interpret the Second Amendment. This Court recognized that the right of the people to keep and bear arms was a right which existed prior to the Constitution when it stated that such a right "is not a right granted by the Constitution... [n]either is it in any manner dependent upon that instrument for its existence." The indictment in *Cruikshank* charged, *inter alia*, a conspiracy by Klansmen to prevent blacks from exercising their civil rights, including the bearing of arms for lawful purposes. This Court held that, because the right to keep and bear arms existed independent of the Constitution, and the Second Amendment guaranteed only that the right shall not be infringed by Congress, the federal government had no power to punish a violation of the right by a private individual; rather, citizens had "to look for their protection against any violation by their fellow-citizens" of their right to keep and bear arms to the police power of the state.

which involved the theft of firearms by private citizens from other private citizens — simply meant the right was not *created by* the Constitution, but that it preexisted the Constitution and that the Second Amendment was "to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes" to the state criminal laws.

Moreover, the Eighth Circuit's one paragraph opinion cited *Miller*, *Oakes*, *supra*, and *Warin*, *supra*, without any explanation, in holding the Second Amendment has been analyzed "purely in term of protecting state militias, rather than individual rights." While this statement is true, it certainly does not mean that *Miller* rejected the conclusion that an individual right was protected. Thus, the Eighth Circuit did not err in concluding that it was important that "Nelson has made no arguments that the Act would impair any state militia . . . ."

U.S. v. Cody, 460 F.2d 34 (8th Cir. 1972) involved the making of a false statement by a convicted felon in connection with the purchase of a firearm. After citing *Miller* for the propositions that "the Second Amendment is not an absolute bar to congressional regulation of the use or possession of firearms" and that the "Second Amendment's guarantee extends only to use or possession which 'has some reasonable relationship to the preservation or efficiency of a well regulated militia,'" the court held there was "no evidence that the prohibition of § 922(a)(6) obstructs the maintenance of a well-regulated militia." Thus, the court acknowledged the Second Amendment would be a bar to some congressional regulation of the use or possession of firearms, and it recognized that *Miller* required the introduction of evidence which showed a militia use for the firearm involved.

In *U.S. v. Decker*, 446 F.2d 164 (8th Cir. 1971), as in *Synnes*, *infra*, the court here held the defendant could "present evidence indicating a conflict" between the statute at issue and the Second Amendment. Since he failed to do so, the court declined to hold that the record-keeping requirements of the Gun Control Act of 1968 violated the Second Amendment. As with *Synnes*, the court once again implicitly recognized that the right guaranteed belonged to individuals.

In *U.S. v. Wiley*, 309 F.Supp. 141 (D. Minn.), *aff'd*, 438 F.2d 773 (8th Cir. 1971), another case involving possession of a firearm by a convicted felon, the court held felons are "a separate class whose *individual right* to bear arms may be prohibited." 309 F.Supp. at 145.

U.S. v. Synnes, 438 F.2d 764 (8th Cir. 1971), *vacated on other grounds*, 404 U.S. 1009 (1972) was another case involving possession of a firearm by a convicted felon. In holding 18 U.S.C. App. § 1202(a) (reenacted in 18 U.S.C. § 922(g) in 1986) did not infringe the Second Amendment, the court held (based upon its partially erroneous view of *Miller*) evidence had to be offered to show the statute impaired the maintenance of a well-regulated militia. As there was "no showing that prohibiting possession of firearms by felons obstructs the maintenance of a 'well regulated militia,'" the court saw "no conflict" between § 1202(a) and the Second Amendment. While *Miller* focused on the need to introduce evidence that the *firearm* had a militia use, *Synnes* at least recognized the relevance of a militia nexus. There was a clear recognition, moreover, that the Second Amendment guarantees an individual right.

As indicated in petitioner's petition, six days after the Ninth Circuit decision in the present case (*Hickman*), a different panel of the Ninth Circuit Court of Appeals stated in a footnote in *U.S. v. Gomez*, 81 F.3d 846 (9th Cir. 1996), "The Second Amendment embodies the right to defend

oneself and *one's* home against physical attack." *Gomez* 81 F.3d at 850, n.7. [emphasis added]. Clearly, this panel interpreted the Second Amendment as guaranteeing a personal right.

In *U.S. v. Oakes*, 564 F.2d 384 (10th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978), although the court recognized the requirement of *Miller* that the defendant show the firearm in question have a "connection to the militia," the court concluded, without any explanation of how it reached the conclusion, that the mere fact that the defendant was a member of the Kansas militia would not establish that connection. In light of the fact *Miller* (which defines the militia as including "all males physically capable of acting in concert for the common defense") saw no relevance in the status of a defendant with respect to the militia, but instead focused upon the firearm itself, this conclusion is not without basis.

In the context of interpreting the meaning of the phrase "engaging in the business of dealing in firearms" in 18 U.S.C. 922(a)(1), the court in *U.S. v. Swinton*, 521 F.2d 1255 (10th Cir. 1975) noted, in *dicta*, merely that "there is no *absolute* constitutional right of an individual to possess a firearm." [Emphasis added.] Clearly, therefore, the court recognized that the right is an individual one, albeit not an absolute one.

Gilbert Equipment Co., Inc. v. Higgins, 709 F. Supp. 1071 (S.D. Ala. 1989), *aff'd*, 894 F.2d 412 (11th Cir. 1990) *(mem)*. The court held that the Second Amendment "guarantees to all Americans 'the right to keep and bear arms' . . . ."

Based upon the above survey, it is obvious the courts of appeals are having difficulty interpreting both the Second Amendment, as well as this Court's decision in *Miller*. The circuits are not only split as to each other, but there are

diametrically opposed rulings from different panels within the same circuit. The result is a confusing quagmire of inconsistent rulings.

Amici respectfully submit it is incumbent upon this Court to step in and, finally, resolve this very important issue.

III. THE VAST MAJORITY OF SCHOLARS HAVE ENDORSED THE VIEW THAT THE SECOND AMENDMENT GUARANTEES AN INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS

Innumerable politically based pronouncements in non-scholarly sources claim the Second Amendment does not guarantee a right of individuals, but rather, guarantees only the "states' right" to arm their militias. That position (which we shall call the " "states' right" " view) is rejected by the great majority of modern legal scholars, *inter alia* because the very concept of the Second Amendment as a "states' right" was completely unknown to the authors of the Bill of Rights (hereinafter described as the Founders or the Founding Fathers).

Of 41 law review articles published since 1980 which offer substantial discussion of the Amendment, just four take the "states' right" position. None of these four was published on its merits — each being in a symposium in which anti-gun groups and/or individuals were invited to submit articles detailing their position.[6]

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[6]Ehrman and Henigan, "The Second Amendment in the 20th Century: Have You Seen Your Militia Lately", 15 U. DAYTON L. REV.5 (1989) and Henigan, "Arms, Anarchy and the Second Amendment", 26 VALPARAISO U. L. REV. 107 (1991) — both written by general counsel of Handgun Control, Inc.; Fields, "Guns, Crime and the Negligent Gun Owner", 10 N. KY. L. R. (1982) (article by non-lawyer lobbyist for the National Coalition to Ban Handguns); Spannaus, "State Firearms Regulation and the Second Amendment", 6 HAMLINE L. R. 383 (1983) (Minnesota attorney general).

In contrast, articles accepting the Amendment as an individual right are published on their own merits and in respected law reviews.[7] The authors include outstanding

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In addition, see Beschle, "Reconsidering the Second Amendment: Constitutional Protection for a Right of Security", 9 HAMLINE L. R.69 (1986) (conceding that the Amendment does guarantee a right of personal security, but arguing that can constitutionally be implemented by banning and confiscating all guns). A somewhat equivocal position is taken in Williams, "Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment", 101 YALE L.J. 551 (1991) (the Amendment is an individual right but may not be applicable to present in which only one half of households are armed since its purpose was to insure that the entire populace would be armed).

The article count we have given does not include three other articles: two by authors who disapprove of the constitutional right to arms, but do not seem to deny its existence, Powell, "Capital Punishment, 102 HARV. L. REV. 1035, 1045 (1989) and Brown, "Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's 'The Embarrassing Second Amendment'" 99 YALE L. J. 661 (1989); and a third article which simply catalogs the contending positions taken by each side, Becker, "The Politics of Women's Wrongs and the Bill of 'Rights': A Bicentennial Perspective" 59 U. CHI. L. R. 453 (1992).

[7]Van Alstyne, "The Second Amendment and the Personal Right to Arms", 43 DUKE L. J. 1236 (1994), Amar, "The Bill of Rights and the Fourteenth Amendment", 101 YALE L. J. 1193, 1205-11, 1261-2 (1992); Don B. Kates, "The Second Amendment and the Ideology of Self-Protection" 9 CONST. COMM. 87 (1992); Kates, Cottrol & Diamond, "The Second Amendment: Toward an Afro-Americanist Reconsideration", 80 GEORGETOWN L.J. 309 (1991); Amar, "The Bill of Rights as a Constitution", 100 YALE L. J. 1131, 1164ff. (1990); Levinson, "The Embarrassing Second Amendment", 99 YALE L. J. 637 (1989); Kates, "The Second Amendment: A Dialogue", 49 LAW & CONTEMP. PROBS. 143 (1986); Malcolm, Essay Review, 54 GEO. WASHINGTON U. L. REV. 582 (1986); Fussner, Essay Review, 3 CONSTITUTIONAL COMMENTARY 582 (1986); Shalhope, "The Armed Citizen in the Early Republic", 49 LAW & CONTEMP. PROBS. 125 (1986); Halbrook, "What the Framers Intended: A Linguistic Interpretation of the Second Amendment", 49 LAW & CONTEMP. PROBS. 153 (1986); Kates, "Handgun Prohibition and the Original Meaning of the Second Amendment", 82 MICH.

L. REV. 203 (1983) (hereinafter described as "Original Meaning); *see also* Scarry, "War and the Social Contract: The Right to Bear Arms", 139 U. PA. L. REV. 1257 (1991); Williams, "Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment", 101 YALE L. J. 551 (1991).

The remainder of the 37 individual right articles are in less prestigious law reviews: Kates & Reynolds, "The Right to Keep and Bear Arms Under the Tennessee Constitution", forthcoming in 61 TENN. L. REV. # 2 (Winter, 1994) (extensively discussing the Second Amendment in relation to the Tennessee Constitution), Halbrook, "Rationing Firearms Purchases and the Right to Keep Arms" 96 W. VA. L. REV. 1 (1993); Comment: "Gun Control Legislation and the Intent of the Second Amendment: To What Extent is There an Individual Right to Keep and Bear Arms?" 37 VILLANOVA L. REV. 1407 (1992); Halbrook, "The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment", 26 VALPARAISO L. REV. 131 (1991); Tahmassebi, "Gun Control and Racism", 2 GEO MASON CIV. RTS.L. J. 67 (1991); Bordenet, "The Right to Possess Arms: the Intent of the Framers of the Second Amendment", 21 U.W.L.A. L. REV. 1 (1990); Moncure, "Who is the Militia - The Virginia Ratifying Convention and the Right to Bear Arms", 19 LINC. L. REV. 1 (1990); Lund, "The Second Amendment, Political Liberty and the Right to Self-Preservation", 39 ALA. L. REV. 103 (1987); Morgan, "Assault Rifle Legislation: Unwise and Unconstitutional", 17 AM. J. CRIM. L.143 (1990); Dowlut, "Federal and State Constitutional Guarantees to Arms", 15 U. DAYTON L. REV. 59 (1989); Halbrook, "Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment, 15 U. DAYTON L. REV. 91 (1989); Hardy, "The Second Amendment and the Historiography of the Bill of Rights", 4 J. LAW & POLITICS 1 (1987); Hardy, "Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment", 9 HARV. J. LAW & PUB. POLICY 559 (1986); Dowlut, "The Current Relevancy of Keeping and Bearing Arms", 15 U. BALT. L. FOR. 32 (1984); Malcolm, "The Right of the People to Keep and Bear Arms:The Common Law Tradition", 10 HAST. CONST. L. Q. 285 (1983); Dowlut, "The Right to Arms", 36 OKL. L. REV. 65 (1983); Caplan, "The Right of the Individual to Keep and Bear Arms" 1982 DET. COLL.L. REV. 789; Halbrook, "To Keep and Bear 'Their Private Arms' ", 10 N. KY. L. REV. 13 (1982); A. Gottlieb, "Gun Ownership: A Constitutional Right" 10 N. KY. L. REV. 138 (1982); Gardiner, "To Preserve Liberty — A Look at the Right to Keep and

liberal constitutional scholars such as Akhil Amar, Sanford Levinson and William Van Alstyne — none of whom own guns or expected that the evidence would force this position on them. In his just published piece, Prof. Van Alstyne, a former member of the ACLU national board, describes the

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Bear Arms", 10 N. KY. L. REV. 63 (1982); Note, "Gun Control: Is It A Legal and Effective Means of Controlling Firearms in the United States?", 21 WASHBURN L.J. 244 (1982); Halbrook, "The Jurisprudence of the Second and Fourteenth Amendments," 4 GEO MASON L. REV. 1 (1981).

The following treatments in book form also support the individual right position is correct: J. Malcolm, "ARMS FOR THEIR DEFENCE": THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (Harvard U. Press, 1994); D. Kates & R. Cottrol, GUN CONTROL AND THE CONSTITUTION (Garland, 1993); Kates, Cottrol & Diamond, "Public Safety and the Right to Bear Arms", in D. Bodenhamer & J. Ely, AFTER 200 YEARS; THE BILL OF RIGHTS IN MODERN AMERICA (Ind. U. Press, 1993); D. Kates, OXFORD COMPANION TO THE UNITED STATES SUPREME COURT (Oxford U. Press, 1992) (entry on the Second Amendment); E. Foner & J. Garrity, READER'S COMPANION TO AMERICAN HISTORY 477-78 (Houghton Mifflin, 1991) (entry on "Guns and Gun Control"); D. Kates "Minimalist Interpretation of the Second Amendment" in E. Hickok (ed.), THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING (U. Va. Press, 1991); S. Halbrook, A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND CONSTITUTIONAL GUARANTEES (Greenwood, 1989); L. Levy, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 341 (Macmillan, 1988); D. Hardy, ORIGINS AND DEVELOPMENT OF THE SECOND AMENDMENT (Blacksmith,1986); D. Kates, ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION (Macmillan, 1986) (entry on the Second Amendment); S. Halbrook, "THAT EVERY MAN BE ARMED": THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984); Marina, "Weapons, Technology and Legitimacy: The Second Amendment in Global Perspective" and Halbrook, "The Second Amendment as a Phenomenon of Classical Political Philosophy" — both in D. Kates (ed.), FIREARMS AND VIOLENCE (1984); Senate Subcomm. on the Constitution of the Comm. on the Judiciary, 97th Cong., 2d Sess., RIGHT TO KEEP AND BEAR ARMS (1982).

individual right/"states' right" debate as being between those who take the Bill of Rights seriously and those who do not.[8]

IV. THE IMPLICATIONS OF THE "STATES' RIGHT" VIEW CANNOT WITHSTAND EXAMINATION.

Professor Van Alstyne actually understates the matter when he characterizes the individual rights vs. "states' right" debate as one between those who do take the Bill of Rights seriously and those who do not. In fact, advocates of the "states' right" view do not even take their own position seriously enough to explore its potential results — which turn out to be at least as socially adverse as those often attributed to the individual right view.

In that view the basis of the Second Amendment was the right to arms for personal defense, no distinction being made between apolitical and political crime.[9] Accordingly, both

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[8]Van Alstyne, 43 DUKE L. J. *supra* at 1254-5. Compare Professor Levinson's analysis: If the Second Amendment is to be read out of the Constitution "in the name of social prudence why do we not apply such consequentialist criteria to each and every part of the Bill of Rights? As Ronald Dworkin has argued, what it means to take rights seriously is that one will honor them even when there is significant social cost in doing so. If protecting freedom of speech, the rights of criminal defendants, or any other part of the Bill of Rights were always (or even most of the time) clearly costless to the society as a whole, it would truly be impossible to understand why they would be as controversial as they are 'Cost-benefit' analysis, rightly or wrongly, has come to be viewed as a 'conservative' weapon to attack liberal rights. Yet one finds that the tables are strikingly turned when the Second Amendment comes into play." 99 YALE L. J. *supra* at 657-58.

[9]Don B. Kates 9 CONSTITUTIONAL COMMENTARY *supra* at 89-103 citing examples and quoting and analyzing Locke, Sidney, Montesquieu, Blackstone, Madison, Jefferson, Paine and numerous others. See discussion and quotations in footnote 20 *supra*.

the Amendment's text and the logic of the individual rights view limit the kind of weaponry the Amendment guarantees individuals to small arms only.

But the "states' right" view holds that the Amendment was intended to guarantee that states may equip their forces with arms sufficient to counterbalance the military force of the federal government. Thus any *honest*, conscientious treatment of the "states' right" view requires asking: Does not this position involve the conclusion that every state may, if it wishes, stockpile not just small arms but artillery, bombers, aircraft carriers, ICBMs and nuclear weapons for the use of its forces?[10] If the proponents of the "states' right" view have some *honest, principled* basis for a negative answer to the foregoing question, they have failed to offer it in their articles. Those articles "answer" such questions by ignoring them. "states' right" articles explore none of that view's implications beyond the naked claim that the Amendment does not preclude government from banning and confiscating all privately owned firearms.

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[10]Space permits mentioning just one of the textual and logical limitations implicit in the individual view which are inapplicable to the states' right-only view. The Amendment guarantees the right to "keep *and bear* arms": Since an 18th Century man could not bear (i.e. pick up) cannon, the intent seems limited to small arms. By parity of reasoning it would not include even now-portable arms, like bazookas, because they are comparable in destructiveness to an 18th Century cannon.

But that limitation does not apply if the Amendment be deemed to create a states' right to possess military forces against the United States. If one can stomach the incongruity of describing a state as "bearing" arms, that state is obviously no more incapable of "bearing" cannon than any other kind of arms.

For a catalog of textual and logical limitations implied by the individual right view see, e.g. Don B. Kates "Original Meaning", 82 MICH. L. REV. *supra* at 259*ff.* (1983); D. Kates, 49 LAW & CONTEMP. PROBS. *supra* at 146-8 and Halbrook, 49 LAW & CONTEMP. PROBS. *supra* at 157-60.

A related question arises from the crucial difference between the two views in defining what "militia" means as that term is used in the Amendment. The individual rights view rests on the preferred 18th Century meaning of "militia" — not some formal military unit, but a system under which each household was required to be armed and virtually every military-age male was required to own arms and appear for training and/or service when called to do so.[11] But in the "states' right" view the word "militia" refers to a formal military unit, a body of troops serving the state. Indeed, it is regularly asserted by partisans of that view that the "militia" is the National Guard, notwithstanding this Court's holding in *Perpich v. Department of Defense*, 496 U.S. 334 (1990). But if these claims of the "states' right" analysts are correct, how can one escape the conclusions: a) that the Amendment repeals Art. I § 10, cl. 3, of the original Constitution which forbids states to "keep troops" without the consent of Congress; and b) that *Perpich* was wrongly decided, a cognate effect of the Amendment having been to modify Art. I, § 8, cls. 15 and 16 by exalting state power over the militia vis-a-vis federal?[12]

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[11] Don B. Kates, "Original Meaning", 82 MICH. L. REV. *supra* at 214-8 ("In short, one purpose of the Founders having been to guarantee the arms of the militia, they accomplished that purpose by guaranteeing the arms of the individuals who made up the militia." *Id.* at 215), Shalhope, 49 LAW & CONTEMP. PROB. *supra* at 133 ("Individuals had the right to possess arms to defend themselves and their property; and states retained the right to maintain militias composed of these individually armed citizens."). *See also* note 18 *supra* and Amar, 100 YALE L. J. *supra* at 1166 as quoted in note 24 *infra* and ut any qualifying adjective, 'the militia' referred to all Citizens capable of bearing arms . . . [So] 'the militia' is identical to 'the people'. . . ").

[12] In fact, the concept of militia held by partisans of the states' right-only view is simply not the "militia" concept to which the Amendment refers: "Nowadays, it is quite common to speak loosely of the National Guard as 'the state militia,' but 200 years ago, any band of paid, semi-professional part-time volunteers, like today's Guard, would have been

To reiterate, partisans of the "states' right" view have not even attempted to grapple with these questions. Though their articles purport to champion a "states' right" view, in fact it is just a makeweight — a disingenuous gibberish-concept which is presented without analysis of its content or implications solely to evade the inconvenient truth that the Amendment precludes the prohibition and confiscation of all firearms.

Respectfully submitted,

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called 'a *select* corps' or '*select* militia' — and viewed in many quarters as little better than a standing army. In 1789, when used without any qualifying adjective, 'the militia' referred to all Citizens capable of bearing arms [So] 'the militia' is identical to 'the people'..." Amar, *supra*, 100 YALE L. J. at 1166, emphasis in original. *See also:* J. Malcolm, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 162-3 (Harvard U. Press, 1994): "The argument that today's National Guardsmen, members of a select militia, would constitute the *only* persons entitled to keep and bear arms has no historical foundation. [Emphasis in original.]"